The Duty to Warn within the Implied Warranty of Merchantability: *Reid v. Eckerds Drugs, Inc.*

The recent North Carolina decision of *Reid v. Eckerds Drugs, Inc.*[1] added yet another weapon to the consumer's arsenal against merchants and manufacturers. Despite the rapid development of products liability law over the last fifty years and the deluge of state and federal regulation of consumer goods, the courts are unsatisfied with the level of protection afforded the average American consumer. They continue to find new legal theories and expand old ones to aid the inexperienced consumer in coping with our complex and highly technological marketplace. *Reid*, by its finding that a warning of possible product hazards was a requisite to merchantability,[2] will greatly facilitate future claims of breach of implied warranty of merchantability.

The duty to warn of the dangerous propensities of one's product has long been an accepted source of tort liability under negligence principles.[3] As strict products liability gained acceptance and developed, the failure to provide adequate warnings made a product defective and unreasonably dangerous under that theory as well.[4] This Case Comment will examine the role that duty now plays in an implied warranty of merchantability case.

I. History and Development

A claim of breach of warranty originally sounded in tort as an action for trespass on the case for deceit.[5] Later, pleading a warranty *indebitatus assumpsit* brought it within the sales arena, and it has largely remained identified with contracts to date.[6] Warranties have long been an integral part of the products liability field.[7] Early in this century, the idea of warranty as a form of strict liability without proof of negligence was accepted by the courts as grounds for recovery by an injured buyer against a seller.[8] Initially the privity doctrine[9] made recovery against the

1. 40 N.C. App. 476, 253 S.E.2d 344, *discretionary review denied*, 297 N.C. 612, 257 S.E.2d 219 (1979).

2. *Id.* at 482, 253 S.E.2d at 348-49.

3. Dillard & Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145 (1955) has a thorough discussion of the duty to warn of product hazards under negligence principles.

4. Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 SW. L.J. 256 (1969) provides an excellent analysis of the duty to warn within the context of strict liability.

5. W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 2 at 8 (1979).

6. *Id.* Prosser described warranty as "a freak hybrid born of the illicit intercourse of tort and contract." Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 800 (1966).

7. *See* Van Bracklin v. Fonda, 12 Johns 468 (N.Y. 1815), which held the seller of defective beef liable on the grounds of warranting the wholesomeness of the food product.

8. Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 111 So. 305 (1927).

9. Generally the rule was "that a manufacturer or seller of a product alleged to have caused injury could not be held liable for such injury to one with whom the manufacturer or seller was not in privity of contract." 2 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 10:2 at 331 (2d ed. 1974). Averbach explains "the privity requirement was that the consumer of goods could not sue the

manufacturer or by an injured person other than the buyer difficult, but this barrier has been greatly circumscribed or removed by the courts.[10]

The Uniform Commercial Code, like its predecessor, the Uniform Sales Act, contains a number of warranty provisions, both express and implied.[11] One such provision, the implied warranty of merchantability, is often the basis for products liability litigation.[12] White and Summers have called section 2-314 "the most important warranty in the Code"[13] and "first cousin to strict tort liability."[14] Although section 2-314 embraces a form of strict liability in that negligence does not have to be shown, the plaintiff is still burdened with demonstrating that the defendant's product deviated from the standard of merchantability and that this deviation proximately and actually caused harm to the plaintiff.[15]

One of the main problems in a section 2-314 case is definition of the merchantability standard. Section 2-314 has given the courts some guidance to this problem by providing:

> Goods to be merchantable must be at least such as:
> (a) pass without objection in the trade under the contract description; and
> (b) in the case of fungible goods are of fair average quality within the description; and
> (c) are fit for the ordinary purposes for which such goods are used; and
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity, within each unit among all units involved; and
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
> (f) conform to the promises or affirmations of fact made on the container or label if any.[16]

Although the above criteria speak of "adequately labeled" and "conforming to affirmations made on the label," the Code does not expressly require warnings of product dangers as a requisite to merchantability. Thousands of cases have addressed this question of what constitutes a merchantable good;[17] most section 2-314 cases finding unmerchantable goods concerned products that "did not work properly or were

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manufacturer of them for breach of contract, which would include breach of warranty, unless the goods were sold by the producer to the consumer, *i.e.*, that the transaction was between the parties to the lawsuit." 3B A. AVERBACH, HANDLING ACCIDENT CASES, § 5 at 3B:6 (1971).

10. 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 3:6 (2d ed. 1974). *See* 3B A. AVERBACH, HANDLING ACCIDENT CASES, §§ 5-13 (1971). For a discussion of privity requirements under the Uniform Commercial Code *see* 2R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY §§ 10:4-10:7 (2d ed. 1974).

11. U.C.C. article 2.

12. U.C.C. § 2-314.

13. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-6 at 343 (1980).

14. *Id.*

15. *Id.*

16. U.C.C. § 2-314(2).

17. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-7 at 349 (1980).

unexpectedly harmful" due to a defect.[18] Whether lack of a warning on a product is an unmerchantable defect is a novel question.

The courts have recognized that both manufacturers and retailers have a duty to warn adequately of foreseeable dangers that might arise as the result of the proper and intended use of a product;[19] a failure to perform this duty with reasonable care is a source of liability under negligence principles.[20] Even if a product is designed and manufactured with reasonable care, liability thus may result if there is an inherent danger that has not been made known to the user. This duty is also expressed in section 388 of the Restatement (Second) of Torts, which provides in part:

> One who supplies . . . a chattel for another to use is subject to liability . . . for physical harm caused by the use of the chattel in the manner for which . . . it is supplied, if the supplier . . . (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.[21]

A similar duty has been found with respect to strict liability; if a product is not accompanied by adequate warnings or directions, it may be defective and unreasonably dangerous.[22] Section 402A of the Restatement (Second) of Torts, relating to the doctrine of strict liability, provides: "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property. . . ."[23] A comment to this section explains that "[i]n order to prevent the product from being unreasonably dangerous, the seller may be

18. *Id.* at 351.

19. 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 8.01 (1979) and cases cited therein; 2A L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 18.02 (1979) and cases cited therein. *See* Dillard and Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145 (1955) for a discussion of the duty to warn of product hazards under negligence principles.

20. *Id.*

21. The full text reads as follows:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
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> (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
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> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
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> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

RESTATEMENT (SECOND) OF TORTS § 388 (1965).

22. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16A [4] [f] [vi] (1979). *See* Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 SW. L.J. 256 (1969) for an analysis of the duty to warn within strict tort liability principles.

23. The full text reads as follows:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

required to give directions or warning, on the container, as to its use."[24]

Not all jurisdictions, however, have adopted strict liability.[25] Often a claim of negligence presents impossible proof problems and exposes the plaintiff to damaging defenses such as contributory negligence. As an alternative to strict liability or negligence, one might argue that failure to warn of hazards connected with a product is a breach of warranty. In *Reid*, the plaintiff took precisely that approach, claiming that failure to warn was a breach of the implied warranty of merchantability.[26] Courts, however, have split regarding the recognition of this theory[27] and have been vague concerning the required proof in such a case.

II. STATEMENT OF THE CASE

According to the evidence presented at trial in *Reid v. Eckerds Drugs, Inc.*, defendant had sold an aerosol can of five-day antiperspirant to Mrs. Reid.[28] One morning while preparing for work, Mr. Reid generously sprayed some of the deodorant under his arms and to his neck.[29] After setting the can down and walking across the room, Mr. Reid picked up a cigarette and struck a match, whereupon he burst into blue flame.[30] As a result, Mr. Reid suffered serious burns that followed the pattern of the application of the antiperspirant.[31] The can contained a limited warning and directions with which Mr. Reid admitted he was familiar.[32] The evidence also demonstrated that the deodorant formulation was approximately ninety-two percent alcohol. No mention was made of this fact on the label although Mr. Reid indicated that he knew the can contained alcohol.[33]

Other evidence included an experiment in which defendant's expert attempted to replicate the accident.[34] His findings were that the antiperspirant would not ignite unless a match were held one and one-quarter

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(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

24. RESTATEMENT (SECOND) OF TORTS § 402A, comment j (1965).

25. *See* W. KIMBLE & R. LESHER, PRODUCTS LIABILITY 14 n.41 (1979). Ohio, however, is one of the states that recognizes strict products liability. The Ohio Supreme Court adopted strict products liability in *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977).

26. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344 (1979).

27. 2 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 8:29 at 226 (2d ed. 1974).

28. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 478, 253 S.E.2d 344, 346 (1979).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Brief for Defendant-Appellee at 4, Reid v. Eckerds Drugs, Inc. 40 N.C. App. 476, 253 S.E.2d 344 (1979).

34. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 478, 253 S.E.2d 344, 346 (1979).

inches from a wetted surface.[35] Defendant also brought forth evidence of prior marketing of vast amounts of this product without similar compliants.[36]

Mr. Reid alleged negligence and breach of warranty against the retailer, Eckerds Drugs, Inc., and the manufacturer, J. P. William Co., Inc.[37] Following a ruling of summary judgment against him on all counts by the trial judge, Mr. Reid dropped his negligence claims and appealed on the sole claim of breach of the implied warranty of merchantability against the retailer.[38] After a general review of the warranty of merchantability, the North Carolina Court of Appeals reversed and remanded, holding:

> When one views the product holistically, and especially where dangerous propensities under specified conditions inhere to both container and contents as well as their several interfaces, a failure to adequately warn of all such propensities may, in a proper case, render a product unmerchantable . . . and provide grounds for an action to recover damages for breach of the implied warranty of merchantability.[39]

III. THE DUTY TO WARN

The *Reid* court noted that the question whether the implied warranty of merchantability embraced a duty to warn of a product's dangerous propensities was a novel question for the North Carolina courts.[40] In finding that the duty did exist, the court relied in part on two state court decisions from other jurisdictions, which are not as supportive of the proposition as the *Reid* decision indicated. The opinion cited *Hanson v. Murray*[41] to support the general proposition that the implied warranty of merchantability may include a duty to warn.[42] In *Hanson*, weed killer was applied to rows of carrots planted between orange trees. The trees subsequently sustained damage purportedly due to the weed killer. The *Hanson* court focused on the facts that the supplier knew the spray would cause harm to orange trees and also knew that, at the Hanson farm, the carrot beds to which the herbicide was to be applied were between rows of orange trees.[43] On the basis of these facts the court concluded:

> Failure to warn . . . of the danger under these facts was both actionable negligence and the factor which caused the warranty to be breached. The existence of negligence does not obviate the possibility that a warranty was breached and it is clear that the same operative facts can, under proper

35. *Id.* Defendant-appellee's brief, however, indicates a match must be held even closer, 3/8 of an inch to one inch, in order to ignite a surface wetted with the deodorant. Brief for Defendant-Appellee at 6, Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344 (1979).

36. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 478, 253 S.E.2d 344, 346 (1979).

37. *Id.* at 478-79, 253 S.E.2d at 347.

38. *Id.* at 479, 253 S.E.2d at 347.

39. *Id.* at 482, 253 S.E.2d at 348-49.

40. *Id.* at 480, 253 S.E.2d at 347.

41. 190 Cal. App. 2d 617, 12 Cal. Rptr. 304 (1961).

42. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 482, 253 S.E.2d 344, 349 (1979).

43. Hanson v. Murray, 190 Cal. App. 2d 617, 12 Cal. Rptr. 304, 306 (1961).

> circumstances, give rise to both causes of action. We believe that such circumstances exist here.[44]

This case actually arose under the U.C.C.'s predecessor, the Uniform Sales Act, and the claim was a breach of section 15(1), which is similar to U.C.C. section 2-315, warranty of fitness for a particular purpose.[45] The thrust of the court's decision was that when "[t]he company understood that the spray was for carrots located in close proximity to orange trees," the supplier was obliged to inform the buyer that the goods were not fit for that particular purpose although the goods were fit for the general purpose of killing weeds.[46] More specifically, the court was not saying the goods were not merchantable because of a failure to warn of a danger when used a particular way, but rather that the supplier's knowledge of the intended use and farm layout coupled with his silence implied a warranty that the goods were fit for that particular situation. When the weed killer turned out to be damaging under those circumstances, the warranty was breached. The *Reid* defendant's statement of *Hanson*'s holding as expressed in his petition for discretionary review seems closer on point:

> [W]here the supplier of a product knows that the use of his product under certain circumstances will cause damage and the buyer makes known to the seller that the product is to be used under those circumstances and it appears that the buyer relies on the seller's skill or judgment then the seller must warn the potential user of the danger inherent in using the product under those circumstances and failure to do so is a breach of an implied warranty of fitness.[47]

The *Hanson* holding relates to the much narrower duty to warn of known dangers of a known particular use, rather than a general duty to warn of all possible uses. In *Reid*, the warranty that the product was fit to serve as deodorant was much more general in nature. No special or unusual uses or circumstances were contemplated. The seller had no knowledge that the buyer was going to use the product in any special way, and, therefore, the seller did not have a duty to warn the buyer that the product could not be used safely in that manner.

The *Reid* court may have been using *Hanson* as an analogy to demonstrate that implied warranties could include duties to warn, and the opinion later noted that similar expectations on the part of the buyer arise out of the warranties of fitness and merchantability.[48] That does not

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44. *Id.* at 623-24, 12 Cal. Rptr. at 308.

45. The Code describes the implied warranty of fitness for a particular purpose as:
> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

U.C.C. § 2-315.

46. Hanson v. Murray, 190 Cal. App. 2d 617, 623, 12 Cal. Rptr. 304, 307 (1961) (emphasis omitted).

47. Defendant's Petition for Discretionary Review at 11-12, Reid v. Eckerds Drugs, Inc., 297 N.C. 612, 257 S.E.2d 219 (1979).

48. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 484, 253 S.E.2d 344, 350 (1979).

necessarily follow, however, for the two U.C.C. sections embrace different concepts and standards.

The other case upon which the *Reid* court relied,[49] *Hamon v. Digliani*,[50] was also a dubious case to cite for the proposition that the implied warranty of merchantability includes a duty to warn. The North Carolina court described *Hamon* as "holding that, where a product was advertised as 'safe and easy' on hands, that product was not merchantable where it was capable of causing burns on contact and where warnings did not explicitly so indicate."[51] Actually, the *Hamon* court did not find any particular product to be unmerchantable due to inadequate warnings. The case arose out of the purchase of a household cleaner in reliance on substantial advertising, and the plaintiff received burns when the cleaner subsequently spilled on her. The plaintiff brought suit against the retail storekeeper and the manufacturers for breach of express and implied warranties. The trial court sustained the defendants' demurrer to the complaint on the basis of lack of privity.[52] The *Hamon* decision thus focused on the issue whether lack of privity is a bar to an action based on a breach of warranty.

In explaining how the implied warranty arises from the manufacturer in the absence of privity, the *Hamon* court suggested that there might be a duty to warn.[53] The court reasoned:

> The manufacturer or producer who puts a commodity for personal use or consumption on the market in a sealed package or other closed container should be held to have impliedly warranted to the ultimate consumer that the product is reasonably fit for the purpose intended and that it does not contain any harmful and deleterious ingredient of which due and ample warning has not been given. Where the manufacturer or producer makes representations in his advertisements or by the labels on his products as an inducement to the ultimate purchaser, the manufacturer or producer should be held to strict accountability to any person who buys the product in reliance on the representations and later suffers injury because the product fails to conform to them. Lack of privity is not a bar to suit under these circumstances.[54]

Standing alone, the above quote appears to mandate a warning of harmful ingredients as a requisite of merchantability, but when read in the context of the case, it is used as a policy argument for overcoming lack of privity.[55] In other words, the court appears to be saying that these are strong reasons to ignore privity, or at least these are situations in which the absence of privity will be overlooked. The court, however, was concerned "only with the sufficiency of the second count [breach of warranty] to withstand

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49. *Id.* at 483, 253 S.E.2d at 349.
50. 148 Conn. 710, 174 A.2d 294 (1961).
51. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 483, 253 S.E.2d 344, 349 (1979).
52. Hamon v. Digliani, 148 Conn. 710, 174 A.2d 294 (1961).
53. *Id.*
54. *Id.* at 718, 174 A.2d at 297-98 (citations omitted).
55. *Id.*

demurrer [from a challenge of no privity] and not with the proof that will be required on the trial."[56]

The *Reid* court, however, is not alone in its opinion that section 2-314 embraces a duty to warn. Although the issue has not been litigated extensively, the courts have held both ways on it, with the more recent decisions tending to find a duty.[57] Nevertheless, two cases that quite explicitly rejected the idea of a duty to warn as part of an implied warranty were *Muncy v. Magnolia Chemical Co.*[58] and *Reddick v. White Consolidated Industries, Inc.*[59]

In *Muncy*, the plaintiff developed a rash when he was accidentally sprayed with a lice insecticide. He brought suit against the manufacturer alleging breach of implied warranty and negligence for failure to provide an adequate warning on the product. The plaintiff rested his claim on the ground that the warning on the defendant's product did not comply with state and federal insecticide statutes and regulations.[60] The court, following the strict liability theory expressed in section 402A of the Restatement (Second) of Torts, found a duty on the part of the manufacturer to warn users of the inherently dangerous product and that the adequacy of the warning on the label was a question of fact.[61] Despite finding a question of adequate warning under strict liability, the court refused to find such an issue under warranty.[62] With respect to the warranty theory, the court stated: "[W]e are of the opinion there could be no recovery under this record on the basis of implied warranty . . . . There is no evidence the product was defective or that it was not fit for the purpose for which it was sold."[63] In other words, an inadequate warning would not be a defect that would make a product unmerchantable.

The other case that specifically rejected a duty to warn in the implied warranty of merchantability, *Reddick*, was an action for asphyxiation against a manufacturer of a gas heater.[64] The plaintiff alleged both a breach of express and implied warranties due to the lack of appropriate

56. *Id.* at 718-19, 174 A.2d at 298.

57. Cases against finding a duty to warn under the implied warranty of merchantability include Reddick v. White Consol. Indus., Inc., 295 F.Supp. 243 (S.D. Ga. 1969); Love v. Wolf, 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (1964); Muncy v. Magnolia Chem. Co., 437 S.W.2d 15 (Tex. Civ. App. 1968). *See* American Hardware Mut. Ins. Co. v. Griffith Rubber Mills, 252 Or. 182, 448 P.2d 515 (1968). Cases supporting view that the implied warranty of merchantability embraces a duty to warn include Gardner v. Q.H.S., Inc., 448 F.2d 238 (4th Cir. 1971); Wilhelm v. Globe Solvent Co., 373 A.2d 218 (Del. Super. 1977); Jones v. Hittle Service, Inc., 219 Kan. 627, 549 P.2d 1383 (1976). *See* Harris v. Belton, 258 Cal. App. 2d 595, 65 Cal. Rptr. 808 (1968); Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967); Hardman v. Helene Curtis Indus., Inc., 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964).

58. 437 S.W.2d 15 (Tex. Civ. App. 1968).

59. 295 F. Supp. 243 (S.D. Ga. 1969).

60. Muncy v. Magnolia Chem. Co., 437 S.W.2d 15 (Tex. Civ. App. 1968).

61. *Id.*

62. *Id.*

63. *Id.* at 20.

64. Reddick v. White Consol. Indus., Inc., 295 F. Supp. 243 (S.D. Ga. 1969).

warnings concerning the dangers of faulty installation. The court, without giving reasons, held the express warranty made no such claim and that the "[l]ack of adequate warning by a seller concerning the danger of carbon monoxide gas . . . may create liability under the general law of negligence but the manufacturer's failure to warn the consumer is not, as I see it, a breach of implied warranty."[65]

Three of the clearest statements of the other side of the issue all concerned situations in which the failure to warn of a danger was alleged to be both negligence and a defect breaching the implied warranty of merchantability.[66] In *Gardner v. Q.H.S., Inc.*,[67] paraffin hair curlers ignited and sparked an apartment fire when the water in which they were heated was allowed to boil away. Their package contained a cautionary note about the danger of letting the water boil dry. The court found:

> [A] supplier and a manufacturer of a chattel are liable to all whom they should expect will use the chattel or be endangered by its use if (a) they know or have reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, (b) they lack reason to believe that the user will realize the potential danger, and (c) they fail to exercise reasonable care to inform of its dangerous condition or the facts which make it likely to be dangerous.[68]

These elements are negligence standards from section 388 of the Restatement (Second) of Torts,[69] but the court added that "[t]he same is true with respect to a cause of action for breach of an implied warranty of merchantability under the Uniform Commercial Code, as that warranty is breached when goods are not 'fit for the ordinary purposes for which such goods are used.' "[70] The court also tested the sufficiency of the evidence concerning a jury issue of negligence and concluded that "while the separate theories of negligence and breach of warranty are not always coextensive, we think the same evidence sufficient to constitute a jury issue as to whether the rollers were of merchantable quality."[71]

The Kansas Supreme Court in *Jones v. Hittle Service, Inc.*[72] went through a similar analysis and arrived at a like conclusion. In *Jones*, properly odorized propane gas leaked into a cellar and was set off by a lighted cigarette. Plaintiffs alleged that defendants breached their duty to give adequate warning of the hazards and characteristics (including odor) of propane gas and that this failure to warn was both negligence and a

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65. *Id.* at 249.

66. Gardner v. Q.H.S., Inc., 448 F.2d 238 (4th Cir. 1971); Wilhelm v. Globe Solvent Co., 373 A.2d 218 (Del. Super. 1977); Jones v. Hittle Serv., Inc., 219 Kan. 627, 549 P.2d 1383 (1976).

67. 448 F.2d 238 (4th Cir. 1971).

68. *Id.* at 242.

69. RESTATEMENT (SECOND) OF TORTS §§ 388, 395 (1965).

70. Gardner v. Q.H.S., Inc., 448 F.2d 238, 242 (4th Cir. 1971).

71. *Id.* at 243.

72. 219 Kan. 627, 549 P.2d 1383 (1976).

defect in the product under strict liability and implied warranty.[73] Accepting this argument, the court held that the failure to warn of the properties of the gas, especially its peculiar smell, may constitute "both negligence under Restatement of the Law, Second, Torts, § 388, or make the product 'defective' under the theories of implied warranty or strict liability in tort."[74] Here again the court looked to negligence principles and said they also apply to implied warranties.

Another case proceeding along these lines, *Wilhelm v. Globe Solvent Co.*,[75] concerned a dry cleaning employee who was burned when a protective towel he wore became saturated with a cleaning solvent and was inadvertently ignited by a cigarette. Plaintiff sued the distributor of the solvent alleging that the failure to warn of the dangerous propensities of the product was negligence and breached the implied warranties of merchantability and fitness for a particular purpose.[76] The court noted that since these theories were all based on the same contention they would be discussed together, and, citing negligence principles, the court concluded "[i]t is well established that a product, although virtually faultless in design, material, and workmanship, may nevertheless be deemed defective where the manufacturer fails to discharge a duty to warn."[77]

Until *Reid*, the theory that a failure to warn was a breach of the implied warranty of merchantability seemed to be riding on the coattails of negligence actions. If a plaintiff was able to demonstrate that a manufacturer or supplier was negligent in breaching a duty to warn, then it was not an untenable position for a court to consider that same duty to be a part of an implied warranty. *Reid*, however, untied the warranty cause of action from the negligence claim and firmly established that a failure to provide adequate warnings of product hazards could be a breach of the implied warranty of merchantability standing alone. Such a cause of action will be a boon to injured consumers who hesitate to bring a suit because of the difficulties in proving negligence and who are within jurisdictions that do not recognize strict products liability.

IV. ELEMENTS TO BE PROVED

A. *Generally*

In an implied warranty of merchantability case, a claimant must demonstrate "(1) that a merchant sold goods, (2) which were not 'merchantable' at the time of sale, and (3) injury and damages to the plaintiff or his property (4) caused proximately and in fact by the defective

73. *Id.*

74. *Id.* at 635, 549 P.2d at 1391-92.

75. 373 A.2d 218 (Del. Super. 1977).

76. *Id.*

77. *Id.* at 223, *citing* 63 AM. JUR. 2d *Products Liability* § 42 (1972).

nature of the goods, and (5) notice to seller of injury."[78] *Reid* indicated these elements remain the basis for a claim of breach of warranty due to a failure to warn of product dangers.[79] Usually the second and fourth elements create the greatest difficulties for breach of warranty claimants,[80] but within the context of a failure to warn case, the proof problems are lessened.

For example, ordinarily a plaintiff must demonstrate that the product had a defect at the time of sale (and that no alterations were made thereafter) in order to prove that the product was unmerchantable when sold.[81] When a manufacturing or design defect is alleged, expensive and often incomprehensible expert testimony plus thorough technical research may be required to prove the defect and to show there were no subsequent alterations. However, in a failure to warn case, whether arising under a negligence, strict liability, or warranty theory, the alleged defect pertains to the package or container, not to the contents or product itself.[82] According to *Reid*, one need only produce the label in question, explain its inadequacy, and show that it is identical to all other labels on the same

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78. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-6 at 343 (1980).

79. Reid v. Eckerds Drugs, Inc., 40 N.C.App. 476, 480, 253 S.E.2d 344, 347 (1980).

80. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-7 (1980).

81. Falcon Equip. Corp. v. Courtesy Lincoln Mercury, Inc., 536 F.2d 806 (8th Cir. 1976); Holcomb v. Cessna Aircraft Co., 439 F.2d 1150 (5th Cir.), *cert. denied*, 404 U.S. 827 (1971); Prutch v. Ford Motor Co., 40 Colo. App. 129, 574 P.2d 102 (1977); Gulash v. Stylarama, Inc., 33 Conn. Supp. 108, 364 A.2d 1221 (1975); Guardian Ins. Co. v. Anacostia Chrysler-Plymouth, Inc., 320 A.2d 315 (D.C. App. 1974); Martineau v. Walker, 97 Idaho 246, 542 P.2d 1165 (1975); Linscott v. Smith, 3 Kan. 2d 1, 587 P.2d 1271 (Kan. App. 1978); Herbstman v. Eastman Kodak Co., 68 N.J. 1, 342 A.2d 181 (1975); Kriedler v. Pontiac Div. of Gen. Motors Corp., 514 S.W.2d 174 (Tex. Civ. App. 1974); Ballou v. Trahan, 133 Vt. 185, 334 A.2d 409 (1975).

82. From a practicing attorney's point of view the advantages in alleging a failure to warn over maintaining a claim of defect in the design or manufacturing process are twofold:

> (a) Simplicity. To prove a defect in design or assembly may require the plaintiff to present highly technical evidence that a jury may fail to comprehend. Further, in challenging a product design, the plaintiff is frequently confronted by experts who have a greatly superior knowledge of the product than any expert the plaintiff may be able to produce—the engineer or designer of the product itself. On the other hand, evidence that the plaintiff was injured because he failed to realize that a product he was using was highly flammable, or would not support a foreseeable weight, or would not withstand foreseeable usage, or that a drug was likely to produce serious side effects of which the plaintiff was unaware, and not cautioned against, is not only a claim that the layman can understand, it may also be one with which he can identify.
>
> (b) Economy. Proving a design or assembly case frequently requires the services of expert witnesses, models, photographs, diagrams and extensive research into the technical aspects of the product, and a corresponding cost that may be prohibitive in all but the most serious type of case, and to all but the most experienced attorney.
>
> A failure to warn case is not likely to require such expenditures. The "defect" lies not within the product, but on the label, or the container, or the package insert. Essentially, it consists of a failure to communicate, and proof of this may require nothing more than the product label or container itself, and the testimony of the plaintiff that he did not recognize the danger that resulted in his injury. In certain cases, expert testimony of the necessity and feasibility of a warning, or of the casual connection between the product and the injury may be necessary.

W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 191 (1979).

product to demonstrate the product's unmerchantable quality at time of sale.[83]

B. *A Duty to Warn has Arisen*

The *Reid* court did not address the question of when a duty to warn of product dangers arises with respect to merchantability. It seemed to assume that under the circumstances of the case such notice was automatically necessary. Under negligence principles, however, there is no duty to warn of every possible danger connected with the use of a product; only when a seller or manufacturer knows or has reason to know that his product may be dangerous when used properly and when he has no reason to expect the user will realize the danger does such a duty arise.[84] In determining the presence of a duty to warn in a negligence context, one author explains that the courts primarily balance the following three factors: "first, how likely is an accident to occur when the product is put to a more or less expectable use; second, if an accident does occur, how serious an injury is likely to result; and third, how feasible is it to give an effective warning?"[85]

The duty to warn under strict liability arises similarly, although foreseeability of the danger may not be a prerequisite.[86] Theoretically, since under strict tort liability a seller of a defective product incurs liability in spite of exercising all possible care, the duty to warn may arise absent any foreseeability or knowledge of harm.[87] Commentators suggest that, in practice, foreseeability may be a consideration in the decision whether to apply strict tort liability.[88] In addition, comments to section 402A of the Restatement (Second) of Torts suggest a number of limitations on this duty to warn with respect to common allergies to ingredients or dangers due to excessive consumption.[89]

The warranty cases offer only minimal guidance concerning when a warning of hazards is necessary to make a product merchantable. *Gardner* found that a duty to warn as part of the implied warranty of merchantability arises under the same circumstances as under negligence principles.[90] According to that court the standards for determining the applicability of a duty are (1) the seller or manufacturer know or have reason to know the product is likely to be dangerous for its intended use; (2) they have no reason to expect the user will realize the danger; and (3)

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83. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 485-86, 253 S.E.2d 344, 350 (1979).

84. W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 192 (1979).

85. Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 SW. L.J. 256, 265 (1969).

86. *Id.* at 267.

87. W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 193 (1979).

88. *Id.*

89. RESTATEMENT (SECOND) OF TORTS & 402A, comment j (1966).

90. Gardner v. Q.H.S., Inc., 448 F.2d 238 (4th Cir. 1971).

they fail to exercise reasonable care to inform of its dangerous condition.[91] *Jones* likewise lumped all the theories together and found that "[a] seller has a duty to warn concerning a dangerous product only when he knows or has reason to know that the product is or is likely to be dangerous for the use for which it is supplied."[92] *Wilhelm* set a similar standard discussing negligence and implied warranty theories together.[93] The *Wilhelm* court found that the "duty to warn arises when a manufacturer or seller of a product which, to his actual or constructive knowledge, involves danger to users, places the product on the market."[94] These cases suggest that absent any other precedent to follow regarding warnings within the merchantability context, a court might be justified in applying well established and recognized negligence rules.

If the unmerchantable defect is said to be a failure to warn of a product danger, then logically there must be a danger present before a duty to warn may be imposed. There would be no duty to warn if there were no danger.[95] The *Reid* decision never even considered whether there was indeed a danger. From the opinion, the court appeared only to require the plaintiff to allege an injury by the product. The plaintiff did not have to show that the product could produce the harm he alleged. Nor did the opinion focus on the minimum degree of danger necessary for the imposition of a duty. Even under strict liability the danger must be unreasonable before a warning will be required.[96] Negligence cases hold that there is no duty to warn when there is only a remote possibility of danger[97] or when this type of accident has never been known to occur.[98] In *Reid*, however, despite a showing that no prior similar accidents had occurred out of the thousands of cans marketed[99] and evidence that the accident as alleged could not be duplicated,[100] the court held the danger to be one requiring a warning.

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91. *Id.* at 242.

92. Jones v. Hittle Serv., Inc., 219 Kan. 627, 627, 549 P.2d 1383, 1386 (1976).

93. Wilhelm v. Globe Solvent Co., 373 A.2d 218 (Del. Super. 1977).

94. *Id.* at 223.

95. Although there seem to be no warranty cases on point, a number of negligence cases have adopted this position, *i.e.*, that there is no duty to warn if there is no danger. Bish v. Employers Liab. Assur. Corp., 236 F.2d 62 (5th Cir. 1956); Robbins v. Georgia Power Co., 47 Ga. App. 517, 171 S.E. 218 (1933); Soto v. E. C. Brown Co., 283 A.D. 896, 130 N.Y.S.2d 21 (1954). *See* Pontifex v. Sears, Roebuck & Co., 226 F.2d 909 (4th Cir. 1955); Briggs v. Nat'l. Indus., Inc., 92 Cal. App. 2d 542, 207 P.2d 110 (1949).

96. RESTATEMENT (SECOND) OF TORTS § 402A, comment j (1966).

97. Bish v. Employers Liab. Assur. Corp. 236 F.2d 62 (5th Cir. 1956); Pontifex v. Sears, Roebuck & Co., 226 F.2d 909 (4th Cir. 1955); Twombley v. Fuller Brush Co., 221 Md. 476, 158 A.2d 110 (1960); Katz v. Arundel-Brooks Concrete Corp., 220 Md. 200, 151 A.2d 731 (1959).

98. Stief v. J. A. Sexauer Mfg. Co., 380 F.2d 453 (2d Cir. 1966), *cert. denied*, 389 U.S. 897 (1967); Persons v. Gerlinger Carrier Co., 227 F.2d 337 (9th Cir. 1955); Hunter v. E. I. DuPont De Nemours & Co., 170 F. Supp. 352 (D. Mo. 1958); Beck v. E. I. DuPont De Nemours & Co., 76 Wash. 2d 95, 455 P.2d 587 (1969).

99. Brief of Defendant-Appellee at 4, Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344 (1979).

100. *Id.* at 5-7.

Cases also indicate that, under the implied warranty of merchantability, actual knowledge or a reason to know of dangers is a prerequisite to the imposition of a duty to warn. In *Toole v. Richardson-Merrell, Inc.*,[101] a drug manufacturer was aware from its own tests and field reports that its new product for treatment of arteriosclerosis might also produce side effects such as cataracts, thinning hair, skin irritation, and blood changes, but continued to promote the drug without warning. The court found the product "was not properly labeled in that it did not give adequate warning of inherent dangers," and hence there was a breach of an implied warranty.[102] Neither the manufacturer nor seller in *Reid* had that degree of knowledge of dangers connected with the antiperspirant nor was the injury clearly one that was foreseeable. Quite the contrary, it was a freak accident. Of the thousands of units of the deodorant marketed, no similar accidents had been reported,[103] and efforts to duplicate the incident had failed.[104] The manufacturer did have knowledge that the formulation was ninety-two percent alcohol and was charged with the knowledge of foreseeable harm connected with a high content of alcohol, but he also was aware that government standards did not consider this a flammable formulation.[105] The question is whether there was enough knowledge of foreseeable harm to impose a duty to warn, a question that the *Reid* opinion completely ignored.

As under negligence and strict tort principles, the implied warranty of merchantability imposes no duty to warn of a danger of which the user has actual knowledge.[106] To illustrate, in *Wilhelm v. Globe Solvent Co.*,[107] the injured party was an experienced dry cleaning worker, and the court was convinced that he was well aware of the flammable propensities of the solvent. Based on those facts the court found no duty to warn, explaining that "there is no duty to warn where the user has actual knowledge of the alleged danger"[108] and that such a duty exists only "when those to whom the warnings would go can reasonably be assumed to be ignorant of the facts which a warning would communicate."[109]

These cases, when read together with U.C.C. section 2-316(3)(b) may obviate any duty to warn where there is an open and obvious danger. That section reads:

[W]hen the buyer before entering into the contract has examined the goods or

101. 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967).

102. *Id.* at 709, 60 Cal. Rptr. at 413.

103. Brief of Defendant-Appellee at 4, Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344 (1979).

104. *Id.* at 5-7.

105. *Id.* at 5.

106. Wilhelm v. Globe Solvent Co., 373 A.2d 218 (Del. Super. 1977); Jones v. Hittle Serv., Inc., 219 Kan. 627, 549 P.2d 1383 (1976); Atkins v. Arlans Dept. Store, 522 P.2d 1020 (Okla. 1974).

107. 373 A.2d 218 (Del. Super. 1977).

108. *Id.* at 223.

109. *Id.*

> the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.[110]

Presumably if a danger or defect is open and obvious it would be discovered on an examination; an unreasonable failure to examine resulting in injuries may be said to result from the buyer's actions rather than as a proximate result of a breach of warranty.[111] Hence a supplier is not obligated to warn with respect to obvious dangers; the burden is on the buyer to protect himself against these.

Although the danger in *Reid* may not have been obvious, the plaintiff may have had "actual knowledge of the alleged danger."[112] Cigarette smokers surely must be presumed to know of the fire hazards inherent in the habit; regular smokers must be aware that a stray spark or an errant matchhead may easily set off a fire. They also must know of the dangers involved in smoking around flammable substances and materials. Mr. Reid admitted his awareness of alcohol in the deodorant.[113] Despite plaintiff's knowledge of the danger, however, the court still found that a warning was necessary.

Being confined to summary judgment considerations and also to the facts of the case, the *Reid* opinion did not discuss all the possible limitations upon the finding of a duty. The duty to warn may or may not arise as a function of the use to which the product is being put. The implied warranty of merchantability only applies when a product is being used for its ordinary purpose.[114] Hence, the court in *Turner v. Manning, Maxwell and Moore, Inc.*[115] concluded that there was no duty to warn of the dangerous characteristics of a hoist. The evidence showed that the hoist was reasonably safe for its intended purpose or for some other reasonably foreseeable purpose, and that the danger arose only when the hoist was misused. The breach of the implied warranty of merchantability theory failed because the hoist was reasonably safe for its intended use and the implied warranty does not apply when the product is being used in a manner or for a purpose for which it was not intended.[116] Thus a supplier need only warn of dangers connected with the intended or foreseeable use of his products.[117] Misuse of the product may be a defense to a claim of a failure to warn under the implied warranty of merchantability.[118]

The *Reid* defendant argued vigorously that the formulation's

110. U.C.C. § 2-316(3)(b).

111. U.C.C. § 2-316, comment 8.

112. *See* text accompanying note 32 *supra.*

113. Brief for Defendant-Appellee at 4, Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344 (1979).

114. 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 3:31 (2d ed. 1974).

115. 216 Va. 245, 217 S.E.2d 863 (1975).

116. *Id.*

117. *Id.*

118. *Id.*

compliance with government flammability standards obviates, as a matter of law, any duty to warn.[119] The United States Department of Transportation requires certain tests to determine the flammability of aerosols.[120] Based on these tests, the contents of the five-day antiperspirant in question were nonflammable.[121] The court rejected the view that compliance with government standards makes a product merchantable as a matter of law.[122] It suggested that such evidence may be "pertinent to the issue of the existence of a breach of warranty,"[123] but it was not clear regarding how this evidence should be applied to the case.

White and Summers suggest that government standards and regulations are one area to which an attorney should look in attempting to define the merchantability of a product.[124] They indicate that there is "powerful evidence" of unmerchantability if a product does not meet a requirement of a government standard,[125] but they do not discuss whether compliance with a regulation makes a product merchantable. A few early cases suggested that when the defendant has demonstrated compliance with government standards and the plaintiff has not presented contradictory evidence, the defendant is entitled to a directed verdict.[126] More recent cases indicate that although all government regulations and requirements have been met, a jury is not bound to accept this evidence; rather, it is a question of fact for the jury.[127] For example, in *Brown v. Globe Laboratories, Inc.*,[128] a lamb vaccine was manufactured and produced in full compliance with all government regulations, but circumstantial evidence demonstrated that the vaccine had not performed as it was intended; rather it killed and injured a number of lambs. The court held that circumstantial evidence may be used to demonstrate breach of warranty in spite of the manufacturer's evidence of compliance with government standards.[129]

The cases today are more inclined to follow *Globe Laboratories*' view

119. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 483, 253 S.E.2d 344, 349 (1979).

120. Brief of Defendant-Appellee at 5, Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344 (1979).

121. *Id.*

122. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 483, 253 S.E.2d 344, 349 (1979).

123. *Id.*

124. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 9-7 (1980).

125. *Id.* at 295.

126. Richards v. H.K. Mulford Co., 236 F.2d 677 (6th Cir. 1916); Howard v. United Serum Co., 202 Iowa 822, 211 N.W. 419 (1926); Hollingsworth v. Midwest Serum Co., 183 Iowa 280, 162 N.W. 620 (1917); Durrett v. Baxter Chrysler-Plymouth, Inc., 198 Neb. 392, 253 N.W.2d 37 (1977); Murphy v. Sioux Falls Serum Co., 47 S.D. 44, 195 N.W. 835 (1923).

127. American Cyanamid Co. v. Fields, 204 F.2d 151 (4th Cir. 1953); KLPR-TV, Inc. v. Visual Electronics Corp., 327 F. Supp. 315 (W.D. Ark. 1971); Peckham v. Eastern States Farmers' Exchange, 134 F. Supp 950 (D.R.I. 1955); Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N.W.2d 151 (1957); Pearson v. Franklin Laboratories, Inc., 254 N.W.2d 133 (S.D. 1977); Jacob E. Decker & Sons, Inc. v. Capps, 144 S.W.2d 404 (Tex. Civ. App. 1940).

128. 165 Neb. 138, 84 N.W.2d 151 (1957).

129. *Id.*

of government standards. They regard evidence of compliance with government regulations to be relevant to whether a breach of warranty has occurred, but such proof is not conclusive.[130] One treatise notes:

> Most courts hold that evidence of due care is admissible not to show lack of negligence, which is not involved in warranty actions, but on the issue whether there has been a breach of warranty. . . . Obviously, this type of evidence should have material effect only where plaintiff's evidence on the issue is less than totally convincing.[131]

One case held that it is error to exclude evidence of inspection by Federal Food and Drug Administration officials of the defendant's food plant to rebut circumstantial evidence of improper preparation.[132]

North Carolina has its own case on the role of government standards and regulations in determining merchantability. In *Coffer v. Standard Brands, Inc.*,[133] the plaintiff was alleging breach of implied warranty of merchantability when he injured a tooth biting down on an unshelled nut in a package of mixed nuts. The North Carolina Board of Agriculture had the authority to adopt rules and regulations governing the sale of mixed nuts, and according to the court these regulations demonstrated a tolerance in the trade for some unshelled nuts in a package.[134] Thus, the court concluded, the container of nuts was merchantable, and the defendant was entitled to a directed verdict.[135] In reaching its decision, the *Coffer* court stated: "In assessing the merchantability of goods under G.S. 25-2-314(2) (a) through (f), various state and federal regulatory acts are instructive. This is especially pertinent in regard to a determination of merchantability under G.S. 25-2-314(2) (a), (c)."[136]

The *Reid* court, however, attempted to distinguish *Coffer* and seemingly ignored defendant's evidence that the deodorant conformed with federally set standards for flammability. Their view was that the plaintiff's complaint was not that the deodorant was unmerchantable because of impurities in the formulation as in *Coffer*, but rather that the product was unmerchantable because it failed to provide adequate warnings of dangers in the product.[137] The court thus reasoned that the evidence of the formulation's compliance with government standards was not relevant to the inadequate label issue.[138]

The opinion was not clear regarding whether this evidence had no bearing on the case or whether the court was merely declaring that it was

130. 2 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 16.03 [4] [a] [i] at 3A-99 n.14.8 (1979).

131. *Id.*

132. Savage v. Peterson Distrib. Co., 379 Mich. 197, 150 N.W.2d 804 (1967).

133. 30 N.C. App. 134, 226 S.E.2d 534 (1976).

134. *Id.*

135. *Id.*

136. *Id.* at 139, 226 S.E.2d at 537.

137. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344 (1979).

138. *Id.*

not conclusive as a matter of law. If it is the latter view, the court was probably on firm ground, but they offered little guidance concerning how this evidence should be received by the factfinder. If it is the former, the court was not in line with *Coffer* or the trend of current cases, for generally such information has some relevance. For example, the court's attempt to distinguish *Coffer* did not eliminate the probative value of the compliance evidence. The opinion emphasized that the claim of unmerchantability arose from a failure to warn of dangers, but before a warning is required there needs to be a danger.[139] Evidence of compliance with government standards should at least go to the question whether the product is in fact dangerous and hence whether warning is needed to make the product merchantable. Although not necessarily conclusive, evidence that the formulation meets accepted government standards for flammability does tend to show that the product may not be dangerous to the point of requiring a warning. Perhaps another question that should have been considered in *Reid* was whether the label itself was in conformity with government requirements.[140]

C. *Inadequacy of Warning*

Assuming a warning has been placed on the label, when is it adequate and what is its effect? An appropriate warning would seem to vitiate or limit the implied warranty of merchantability with respect to the dangers mentioned.[141] Despite the U.C.C.'s requirement of specific conspicuous language to exclude or modify the implied warranty of merchantability,[142] a warning that dangers may result from use in a particular manner logically should give the user notice that the product should not be used in that way. It follows that such a use would not be within the ordinary purposes for which such goods are used and hence outside the purview of the implied warranty of merchantability.

Such was the holding of the Supreme Judicial Court of Massachusetts in *Taylor v. Jacobson*.[143] In that case, plaintiff suffered a severe reaction to

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139. *See* text accompanying notes 95-105 *supra*.

140. The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* regulates cosmetics including "articles . . . sprayed on . . . the human body" and prohibits false and misleading labels. 21 U.S.C. § 321. The Act, however, does not create a private right of action. Florida *ex rel.* Broward County v. Eli Lilly & Co., 329 F. Supp. 364 (S.D. Fla. 1971). On the other hand, the Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq.*, provides a private cause of action and a private right of enforcement, including costs and reasonable attorney's fees under §§ 2072-73 for individuals injured by products. However, by definition, the Consumer Product Safety Act expressly excludes coverage of cosmetics that are regulated by the Federal Food, Drug, and Cosmetic Act.

141. W. KIMBLE & R. LESHER, PRODUCTS LIABILITY § 195 (1979).

142. The Code provides:

> (2) Subject to subjection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

U.C.C. § 2-316(2).

143. 336 Mass. 709, 147 N.E.2d 770 (1958).

a hair dye and accordingly alleged that the product was not of merchantable quality and not fit to be used upon her hair. Both the box and the bottle contained warnings that the dye contained ingredients that might irritate some people and referred the user to an accompanying booklet with instructions for a patch test prior to use. Plaintiff read the instructions but ignored the patch test provision. The court held:

> [A] retailer's implied warranty of merchantability with respect to goods not of his manufacture is no wider than that they are reasonably suitable for the ordinary uses for which goods of that description are sold when used in accordance with reasonable, intelligible and adequate warnings and instructions known, or which should have been known to the purchaser.[144]

The court found that the warnings and instructions were sufficiently clear as a matter of law and that since the plaintiff disregarded adequate instructions she could not rely upon the implied warranty of merchantability.[145]

Assuming a warning is necessary to make a product merchantable, the next problem is determining its adequacy. Some guidelines regarding what will be sufficient to discharge a duty to warn under the implied warranty of merchantability would be helpful for retailers and manufacturers, but *Reid* and other warranty cases offer only minimal discussion of the matter.

The *Reid* court concluded that the warning given on the can was insufficient as a matter of law to give plaintiff adequate notice of any dangers.[146] The opinion indicated that warnings on the can must inform the user of any dangers inherent in the package and also any dangerous propensities of the product contained therein.[147] The court found that the warning on this particular aerosol can was inadequate because, in the court's opinion, it only referred to the can itself and did not inform of the flammability of the formulation.[148] As far as requiring the warning to go to any dangers inherent in the product, the court is in line with section 2-314, for its requirement of merchantability clearly applies to both the product and the package.[149] Their reading of the warning, however, is not so easy to accept. The warning on the can read:

> WARNING: Use only as directed. Do not apply to broken, irritated or sensitive skin. If rash or irritation develops discontinue use. Never spray toward face or flame. Do not puncture or incinerate can. Do not expose to heat or store at temperatures above 120° F. Intentional misuse by deliberately concentrating and inhaling the contents can be harmful or fatal. Keep out of reach of children.[150]

144. *Id.* at 716, 147 N.E.2d at 775.

145. *Id.*, 147 N.E.2d at 775-76.

146. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 253 S.E.2d 344 (1979).

147. *Id.*

148. *Id.*

149. Schuessler v. Coca-Cola Bottling Co., 279 So. 2d 901 (Fla. Ct. App. 1973); Gillispie v. Great Atlantic & Pacific Tea Co., 14 N.C. App. 1, 187 S.E.2d 441 (1972); Pugh v. J.C. Whitney & Co., 9 U.C.C. Rep. Serv. 229 (E.D.N.Y. 1971); Lucchesi v. H.C. Bohack Co., Inc., 8 U.C.C. Rep. Serv. 326 (N.Y. Sup. Ct. 1970).

150. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 478, 253 S.E.2d 344, 346 (1979).

The court emphasized that "[t]he warnings of the label are easily understood to refer to the can itself and its proper use. No specific warnings about the use and formulation of the deodorant itself are given."[151] This writer suggests that the warning is not so easily understood to apply solely to the can itself. Surely the statements "Do not apply to broken, irritated or sensitive skin"[152] and "If rash develops, discontinue use"[153] refer to the formulation and not the aerosol can. One might expect to see those words on nonaerosol packages. Perhaps the court meant that the fourth and fifth sentences of the warning could only be understood to refer to the can and its proper use, but is this clearly evident? Is it because this is an aerosol can that it is dangerous to spray toward one's face or a flame, or is it the formulation that makes these actions dangerous, or is it a combination of both? In any event *Reid* concluded that "[a] question of fact as to the sufficiency of the packaging and labeling clearly exists and is one for the jury."[154]

Many of the cases seem to agree with *Reid* that ultimately the adequacy of a warning to make a product merchantable is a question of fact for the factfinder.[155] The question still remains, however, concerning what the factfinder may or must consider in its evaluation. A general statement of possible dangers is not enough; rather a sufficient warning must be specific as to the dangers involved.[156] Apart from warnings of dangers, instructions for use accompanying a product *create* an implied warranty that when so used it is safe and will not injure.[157] The label cannot mislead the user into thinking that following the instructions is sufficient to eliminate any dangers.[158] With respect to the adequacy of instructions, *Reddick* stated: "[T]o satisfy the implied warranty as to merchantability created by a manufacturer's instructions the latter should be sufficiently explicit, complete and unambiguous so as not to result in injurious nonconforming use by ordinary consumers."[159] The *Reid* decision added little to the literature on the question of what standards a warning should be measured against. Rather, the court neatly sidestepped the problem by turning it over to the jury with little guidance.

Reid puts manufacturers and sellers in a no-win situation with respect

151. *Id.* at 482, 253 S.E.2d at 348.

152. *See* text accompanying note 142 *supra.*

153. *Id.*

154. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 484, 253 S.E.2d 344, 350 (1979).

155. Gardner v. Q.H.S., Inc., 448 F.2d 238 (4th Cir. 1971); Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). *Cf.* Love v. Wolf, 226 Cal. App. 2d 378, 38 Cal Rptr. 183 (1964); Muncy v. Magnolia Chem. Co., 437 S.W.2d 15 (Tex. Civ. App. 1968) (negligence cases holding adequacy of warning is question of fact for the jury).

156. Diamond Alkali Co. v. Godwin, 100 Ga. App. 799, 112 S.E.2d 365 (1959), *aff'd*, 215 Ga. 839, 114 S.E.2d 40 (1960).

157. Griffin v. Planters Chem. Corp., 302 F. Supp. 937 (D.S.C. 1969).

158. *Id.*

159. Reddick v. White Consol. Indus., Inc., 295 F. Supp. 243, 250 (S.D. Ga. 1969). Instructions for use accompanying a product might also create an express warranty under U.C.C. § 2-313.

to what a warning label must include. Manufacturers are restrained by the space limitations on the label and by the fact that a product will lose its competitive edge if it sounds more dangerous than other brands. However, a warning of known and reasonably foreseeable dangers in a product is a sensible and legitimate requirement to impose on those who are profiting from the product. *Reid* disregarded all this and found the warning inadequate because it did not embrace the actual harm that occurred. One wonders whether any warning would have been satisfactory to the *Reid* court. For example, the label might have warned "Do not smoke immediately after application." Arguably this warning would have been inadequate because it was not Mr. Reid's cigarette that ignited the deodorant; allegedly it was the striking of a match. Not all matches are struck in the process of lighting cigarettes; they are also used to light, among other things, candles, stoves, and campfires. Perhaps a better warning would have been "Do not strike a match following application of deodorant." However, matches are not the only items that can start fires. A spark from a cigarette might produce similar results. Perhaps the warning should have included "Do not strike a match or smoke immediately after application." But this may be too specific for it does not mention other types of flames with which a user might come into contact. Therefore, a warning that the consumer should "Avoid all flames immediately after application" might be in order. Such a warning, however, fails to account for any dangers present during the actual spraying or handling of the deodorant so perhaps a warning that the "Contents are highly flammable, avoid contact with any flame during and after application" should have been used. But this last warning overstates the hazard and sounds too threatening. A manufacturer might as well not bother to put the product on the market, for what consumer would want to spray such a dangerous formulation under his arms?

Such speculation could go on and on, but it misses the point just as *Reid* did. The question of what an adequate warning must include should not focus on every conceivable harm that might occur, nor should it be measured by whether it covered the harm that actually did occur. Rather, a warning should inform of known and reasonably foreseeable dangers in a manner that reflects the likelihood and degree of harm.

Unlike the warranty decisions, negligence cases have considered the question more thoroughly and have set down some standards for the factfinder to follow, some of which are summarized in the annotation that follows:

> The warning must be appropriate; implicit in the duty to warn is the duty to warn with a degree of intensity that would cause a reasonable man to exercise for his own safety the caution commensurate with the potential danger. From this it follows that the likelihood of an accident taking place and the seriousness of the consequences are always pertinent matters to be considered with respect to the duty to provide a sufficient warning label, and that there is

a particular need for a sufficient warning where there is a representation that the product in question is not dangerous.[160]

D. *Causation*

Presumably, even if a plaintiff proves a duty to warn and demonstrates the lack of warnings or inadequate warnings, he could not recover under a breach of section 2-314 unless the failure to warn was the proximate cause of his injury.[161] *Reid*, in accord with analogous negligence cases, said the "inquiry as to proximate causation would focus upon plaintiff's reliance upon the warnings and instructions and not what agent was physically responsible for the ignition of the flame."[162] More precisely, all a plaintiff needs to show for a prima facie case is that, had an adequate warning been given, he would have avoided the danger.[163]

Since *Reid* was only looking to the appropriateness of a summary judgment, that is all the court needed to consider. But there are a number of ways in which a defendant may demonstrate that the failure to warn was not the proximate cause of the injury. For example, if a claimant does not follow instructions or does not read the label, then an inadequate warning is not the proximate cause.[164] If a product is being misused in a manner for which it is not intended, one cannot argue that the failure to warn is the proximate cause of the injury.[165] In negligence cases, courts have also found that if the person knew of the danger or would not have heeded the warning, the failure to provide adequate warnings would not be the proximate cause.[166] Like adequacy, proximate cause is a question of fact for the jury.[167]

V. CONCLUSION

In effect, *Reid* creates a cause of action with an easy-to-prove prima facie case. All a plaintiff needs to allege is that 1) he was injured while using a product, 2) there was no adequate warning of the danger involved in the injury, and 3) had he been adequately warned he would have better

160. Annot., 76 A.L.R.2d 37 (1961).

161. U.C.C. § 2-314, comment 13.

162. Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 486, 253 S.E.2d 344, 351 (1979).

163. A similar rule has been found in negligence cases. Schenebeck v. Sterling Drug, Inc., 423 F.2d 919 (8th Cir. 1970); Thomas v. A.P. De Sanno & Son, Inc., 209 F.2d 544 (3d Cir. 1954); Haberly v. Reardon Co., 319 S.W.2d 859 (Mo. 1958) (en banc).

164. McCleskey v. Olin Mathieson Chem. Corp., 127 Ga. App. 178, 193 S.E.2d 16 (1972); Taylor v. Jacobson, 147 N.E.2d 770 (Mass. 1958).

165. Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245, 217 S.E.2d 863 (1975).

166. Borowicz v. Chicago Mastic Co., 367 F.2d 751 (7th Cir. 1966); Parzini v. Center Chem. Co., 129 Ga. App. 868, 201 S.E.2d 808 (1973); Patrick v. Perfect Parts Co., 515 S.W.2d 554 (Mo. 1974) (en banc); Technical Chem. Co. v. Jacobs, 480 S.W.2d 602 (Tex. 1972); Alberto-Culver Co. v. Morgan, 444 S.W.2d 770 (Tex. Civ. App. 1969).

167. Speed Fasteners, Inc. v. Newsom, 382 F.2d 395 (10th Cir. 1967); Guardian Ins. Co. v. Anacostia Chrysler-Plymouth, Inc., 320 A.2d 315 (D.C. App. 1974); Bell v. Menzies, 110 Ga. App. 436, 138 S.E.2d 731 (1964); Martel v. Duffy-Mott Corp., 15 Mich. App. 67, 166 N.W.2d 541 (1968); General Supply & Equip. Co., Inc., v. Phillips, 490 S.W.2d 913 (Tex. Civ. App. 1972).

protected himself from the danger either by not using the product in the proscribed fashion or not using it at all.[168] *Reid* relieves the consumer of any obligation to protect himself, even if he has knowledge of the danger.[169] The decision creates liability under even more lax standards than strict tort liability because the danger involved does not have to be unreasonable.[170] The result is that consumers will have an incentive to bring suit under U.C.C. section 2-314 for *any* injury, involving a product, of which they were not warned. If the courts follow *Reid*, very rarely will they be able to dismiss on the pleadings, and a great number of cases will probably be settled to avoid trial.

Until recently, courts probably would have been inclined to give no relief to victims, such as Mr. Reid, of freak accidents. The advent of strict liability, however, prodded many courts to accept the notion that society could and should share the burden of risk of product-related injuries by holding manufacturers and sellers liable and letting them pass the costs on to all consumers. Similar reasoning is necessary to justify a finding that even unforeseeable freak accidents may have to be covered in a warning or the product will be unmerchantable. Obviously, to warn of every conceivable and inconceivable danger would be an impossible task for a manufacturer; he must satisfy himself with a reasonable warning and pass the cost of freak accident liability on to consumers. Perhaps the time has come to reconsider whether society can or should bear such a burden. The American economy is already in the vise grip of double-digit inflation. We do not need to squeeze consumers more by adding the cost of freak accidents on to products. Manufacturers and sellers should be held to a high degree of responsibility for using care in producing, packaging, and labeling goods, but there are limits to how far they reasonably can go. Rather than asking consumers to share the costs for occurrences beyond these limits, perhaps we would benefit more by asking them to share in exercising some degree of care and responsibility for their own safety. *Reid*, however, supports the opposite conclusion.

The result is our society, aided by the courts, has reached the point at which Americans are no longer responsible for themselves; they are now entitled to believe that *whenever* they are injured, someone else should pay.

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168. In addition, plaintiff must show that a merchant sold him the goods and provide notice to the seller of the injury. *See* text accompanying note 78 *supra*.

169. *See* text accompanying notes 106-113 *supra*.

170. *See* text accompanying notes 95-100 *supra*.